

THE NEW SCOPE OF DCOs

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Where are we now?

- The Growth and Infrastructure Act 2013
- The Infrastructure Planning (Business and Commercial Projects) Regulations 2013
SI2013/3221
- HM Treasury 2015, *Fixing the Foundations*
- Ongoing discussion about the future scope of the Housing & Planning Act 2016

Commercial but not housing thus far



- Their scope is set out in 2013 Regs reg 2(2)(a) and the Schedule: *office use; R&D; industrial process or processes; storage and distribution of goods; conferences; exhibitions; sport; leisure; tourism and “winning and working of minerals in, on or under land”*
- Excluded 2(2)(b): *winning or working of peat, coal, oil or gas, or **the construction of one or more dwellings***
- NB “dwellings” does not include workers accommodation for major infrastructure of the kind proposed by EDF for HPC, see *R(Innovia Cellophane Ltd) v DECC* [2011] EWHC 2883 (Admin) esp at [30]

How does a commercial project qualify?



- Gvt will look at “all relevant matters”, including:
- whether a project is likely to have a significant economic impact, or is important for driving growth in the economy;
- whether a project has an impact across an area wider than a single local authority area;
- whether a project is of a substantial physical size – further details are set out below; or
- whether a project is important to the delivery of a nationally significant infrastructure project or other significant development.

Size thresholds guidance

- “substantial size”
- GIA to be created by the project is at least 40,000m²;
- Leisure, tourism and sports facilities where the area to be developed is at least 100 ha;
- Sports stadia where the seating capacity is no fewer than 40,000 seats.

Paramount London



- Major leisure/tourism attraction proposed at Swanscombe next to Ingress Park
- s.35 direction quoted size, economics and single consent aspects as the basis for NSIP qualification
- Inspectorate advice (26 March 2015) stressed that there would be some flexibility (through use of “Rochdale envelope”) but the DCO was not an outline planning permission;

IAMP Sunderland



- Section 35 Direction 15 September 2015
- Major manufacturing
- Part of the Sunderland City Deal and progressed by the two authorities; co-operation thereby built in
- Discussion about whether the TCPA would be quicker, and initial consultation under the aegis of a potential Area Action Plan

Lessons so far with commercial NSIP

- IAMP is a City Deal based proposal with broad political support that could have been advanced through an AAP – relatively uncontroversial and “with the grain”
- Paramount a one-off

Housing as NSIP – the issues



Positives:

- Speed of delivery including CPO, rights etc
- Certainty (by contrast to perceived dysfunctionality of the Local Plan process)
- Community involvement is well-understood now as part of DCO

Housing as NSIP – the issues



Potential negatives:

- “against the grain” it is the antithesis of Localism – it’s a local or at most a regional issue
- Establishing quantum “need” therefore difficult without an NPS – hence why standalone housing NSIP is proving unpalatable
- Ill suited to effective co-ordination with the Local Plan system

Mixed uses – the likely form of NSIP housing



- How great an “element of housing”?
- Functional or “associative” link? Much easier with commercial/business/leisure
- Best through the Local Plan/AAP – with the grain if cycle allows

Building blocks

- The likely H&P Act 2016 provision
- Further legislation – amend s.35 to include housing but with a stipulation that it has to be either “part of a genuine mixed use” – to allow opt-in to DCO
- No lower unit threshold
- SHMA support or local plan(s) allocation
- If relying on SHMA, potential additional policy test that delivery by DCO necessary in the circumstances of the case (eg in cases of severe cross-boundary unmet need)

Need



- Could be done largely by reference to NPPF/PPG and to the SHMA, but
- In the 50% (current), and then rolling, cases where the Plan is out of date or there is no 5 year HLS, is it [right/acceptable] to allow DCO use on the basis of “Policy off” OAN?
- Why not? Constraints will be relevant, even GB; views of all would be considered; only really to be used in ‘last resort’ or ‘intractable’ cases
- For this Government at least, GB release likely be a problem

Conclusion: Housing as part of NSIP



- Residential NSIP where plan-led or LPA supported/promoted – should not be controversial
- In other cases, the DCO process track record is defensible answer to the democratic deficit issue
- Localism has to show it can deliver – but there is a real opportunity where localism is not working: regional/sub-regional NSIPs could include housing eg Oxford's sub-region; Brighton's sub-region – where the neighbouring local authorities cannot meet the full unmet housing need of the city/town which drives the economy.
- Conservative emphasis on housing delivery by the use of innovative solutions – tailor made for housing NSIPs.